Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	

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CONSOLIDATED REPLY TO OPPOSITION TO SELECTED PETITIONS FOR RECONSIDERATION

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SUMMARY

The Commission should grant TCG's petition for reconsideration of the Commission's First Report and Order on two limited issues. First, many parties support TCG's request that the Commission set certain performance standards to assure that incumbent local exchange carriers ("ILECs") meet the interconnection requirements of new entrants. By imposing reporting obligations upon ILECs, both the ILEC and interconnecting carriers will be able to monitor the quality of service provided to the competitive local exchange carrier ("CLEC") as compared to that the ILEC provides itself or affiliates. Second, TCG requested that the Commission establish two separate pricing standards to satisfy the distinct pricing standards set forth in the 1996 Act for interconnection and unbundling and for transport and termination. Several parties concur that the plain language of the 1996 Act requires two standards, such that the rate for transport and termination necessarily excludes joint and common costs.

The Commission also should clarify that only a broad reading of the terms "poles, ducts, conduits, and rights-of-way" will afford all telecommunications carriers nondiscriminatory access to the facilities required to provide competitive service, both now and in the near future as innovative methods of providing service are implemented. The purpose of the Act to foster competition by eliminating bottlenecks cannot be met if utilities are permitted to deny access to unused, yet "reserved," space on their poles.

Finally, the Commission should grant MFS' petition requesting that cross-connections should be specifically designated as unbundled network elements and priced accordingly. In addition, the Commission should clarify that a CLEC may self-provision the cross-connect, which would generate de minimis, if any, expenses.

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To: The Commission

CONSOLIDATED REPLY TO OPPOSITION TO SELECTED PETITIONS FOR RECONSIDERATION

Teleport Communications Group Inc. ("TCG") hereby submits its consolidated reply to opposition to certain petitions for reconsideration regarding aspects of the First Report and Order issued in the above-captioned proceeding,[1] implementing the local competition provisions of the Telecommunications Act of 1996 ("1996 Act").[2]

I. INTRODUCTION

As supported by the Commenters, the Commission should grant TCG's Petition for Reconsideration in this proceeding. First, the Commission should set

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1. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (rel. August 8, 1996) ("First Report and Order").

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

performance standards to assure that ILECs meet the interconnection requirements of competition. Compliance with these standards would be monitored by reporting requirements. Second, the Commission should comply with the two separate pricing standards set forth in the 1996 Act for interconnection and unbundling and for transport and termination, rather than maintaining a single pricing standard for both. As stated in TCG's consolidated opposition, CLEC's must be compensated appropriately for traffic carried over its tandem switch at the tandem rate. A separate pricing standard for transport and termination will help ensure this result.

Several parties have offered persuasive opposition to the petitions of various utilities to circumvent the clear mandate of the 1996 Act. Section 224(f)(1) requires that utilities provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way. This requirement extends to unused pole space, as well as to roofs and other facilities that fall within the definition of "poles, conduits, and rights-of-way."

Finally, several parties join TCG in supporting MFS' petition which requests that cross-connections should be specifically designated as unbundled network elements and priced accordingly. The Commission should grant the petition in light of the evidence provided that cross-connects are an essential element to providing telecommunications services.

II. THE COMMISSION SHOULD GRANT TCG'S PETITION FOR RECONSIDERATION

A. The Commission Should Adopt Performance Standards to Ensure that ILECs Provide Service to New Entrants That Is at Least Equal in Quality to That the ILEC Provides Itself

As TCG has advocated throughout this proceeding, ILECs must be required to meet specified performance standards, such as installation intervals, mean time to repair, service availability standards, and similar performance criteria to ensure that the ILECs are meeting their obligations to provide nondiscriminatory service. Section 251(c)(2)(C) imposes on ILECs the obligation to provide interconnection to telecommunications carriers

> that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any party to which the carrier provides interconnection.[3]

To monitor compliance with this statutory obligation, and to assess the appropriate financial penalty for violation of the obligation, the Commission must establish reporting requirements, to the extent that individual parties have failed to reach agreement on suitable performance standards.[4]

A number of parties support TCG's proposal for performance standards and related reporting requirements as a means of ensuring adherence with the statute. Cox states that "[r]eporting on the quality of service provided to new entrants and other interconnectors is a logical outgrowth of . . . the 1996 Act's prohibitions on

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3. 47 U.S.C. § 251(c)(2)(C).

4. Cf. Bell Atlantic at 16 (noting that TCG and Bell Atlantic have reached agreement on reporting requirements).

discrimination."[5] Similarly, ALTS agrees that "interconnection agreements will be meaningless if they are not implemented in a timely manner and according to their terms."[6] To address this potential problem, ALTS advocates that (1) the obligation to negotiate in good faith includes agreeing to "reasonable commercial enforcement mechanism;" (2) the provision of service according to nondiscriminatory rates, terms, and conditions covers "provisioning, installation intervals, mean time to repair, and other performance criteria;" and (3) an ILEC should be required to report on the provisioning of service to itself and competitors.[7]

In addition, other commenters agree with TCG that detailed performance reporting requirements should decrease the number of complaints that may otherwise be filed concerning the level of service the ILEC provides to its competitors.[8] Sprint concurs that "ILECs who are not involved in discriminatory conduct may well find that the burden of submitting this information is more than offset by averting claims, based on incomplete information, that the carrier is engaged in discrimination."[9] WorldCom similarly believes that reporting requirements "can also assist affected parties in acting as private attorney's

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5. Cox at 11-12.
6. ALTS at 31.
7. Id. at 32.
8. See TCG Petition for Reconsideration at 6.
9. Sprint at 2.

general to securing their rights without the need for regulatory intervention by the Commission."[10]

Contrary to claims by various ILECs,[11] performance standards, which compare service provided by the LEC to itself and to competitors, will be an efficient way to monitor compliance with Section 251(c)(2)(C). The national guidelines adopted by the Commission are insufficient to protect against the discriminatory behavior that has marked the relationships between incumbents and competitors in the past. The Commission has chosen to adopt "general, national rules defining 'nondiscriminatory access' to unbundled network elements, and 'just, reasonable, and nondiscriminatory' terms and conditions for the provision of such elements."[12] While these guidelines are a step toward ensuring that ILECs provide nondiscriminatory access to unbundled network elements, they do not reach the requirement to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself,"[13] nor do they provide a mechanism for monitoring. Performance standards and related reporting requirements will be crucial to enforcing the nondiscriminatory requirements set forth in the 1996 Act, especially in light of the Commission's own recognition of

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10. WorldCom at 7.

11. See NYNEX at 21 (claiming that performance standards will fail to take into account different administrative and operations support systems utilized by LECs); U S West at 25 (opposing the assessment of penalties for violating performance standards).

12. First Report and Order at ¶ 308.

13. See id. at ¶¶ 221-25.

what most CLECs have already experienced — that "incumbent LECs have the incentive and the ability to engage in many kinds of discrimination."[14]

Comparative reporting and a self-policing, self-executing monitoring mechanism for ILEC performance will help both the ILECs and the CLECs assess adherence to the statutory standards. Moreover, despite the preference expressed by some ILECs that this issue be left to negotiations,[15] negotiations between the parties may not result in acceptable terms regarding performance standards and reporting requirements. In addition, new entrants should be able to rely on a consistent federal policy with regard to this issue, and not on the outcome of arbitrations on the state level. The 1996 Act sets a clear standard that does not require state-by-state interpretation and application. Arguments that implementation of this clear standard should be left to the states[16] are unsupported, and the Commission should grant TCG's petition on this issue.

B. The Commission Should Establish a Distinct Pricing Standard for Transport and Termination

Several parties agree that the Commission has not satisfied the requirement under the 1996 Act to establish a separate pricing standard for transport and termination. This outcome is required by the clear language of the Act which

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14. Id. at ¶ 307.

15. See Bell Atlantic at 16; BellSouth at 8; NYNEX at 21.

16. See, e.g., BellSouth at 8 (stating that the Commission appropriately left to "state regulatory bodies any further development of standards if any are necessary"); NYNEX at 21 (claiming that possible differences in state service standards requires leaving performance standards to negotiations).

distinguishes between the pricing standard for transport and termination and for interconnection and unbundled network elements. For interconnection and unbundled elements, the statute permits carriers to recover a "reasonable profit."[17] In addition, the Commission has determined that the applicable TELRIC methodology includes reasonable joint and common costs. However, Section 252(d)(2) requires that transport and termination be priced at "a reasonable approximation of additional costs of terminating such calls."[18]

Parties agree that the clear language of Section 252(d) requires distinct pricing standards. Comcast Cellular states in support of TCG's and NCTA's similar petition that Congress "fittingly determined that the pricing standard for transport and termination should generally yield lower prices than the standard for unbundled elements that competitors could more readily duplicate" than transport and termination — the last bottleneck facility.[19] Cox concurs that the distinction between pricing standards is important and should be retained. Cox points to the "functional distinctions between unbundling switching, which includes all the functionalities of the switch, and transport and termination, which consists merely of routing a call."[20]

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17. 47 U.S.C. § 252(d)(1)(B).

18. 47 U.S.C. § 252(d)(2)(ii).

19. Comcast Cellular at 18.

20. Cox at 13.

In addition, the standard set under Section 252(d)(2) permits only recovery of the additional cost of terminating the calls, thereby rendering recovery of the joint and common costs that are included under the TELRIC methodology impermissible for transport and termination. As US ONE states, "Congress recognized that transport and termination volume does not affect the receiving carrier's fixed costs or its joint and common costs and that these costs should be excluded from the charges for transport and termination."[21] Attempts by GTE and Pacific Bell to characterize joint and common costs as "additional costs"[22] fail to account for the fact that Congress intended two separate standards to apply. The required difference will be satisfied only by the exclusion of all but "additional costs" as required by the 1996 Act.

III. THE COMMISSION SHOULD REJECT EFFORTS TO LIMIT ANY CARRIERS' ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

A. The Commission Should Clarify that Nondiscriminatory Access to "Poles, Ducts, Conduits, and Rights-of-Way" Should Not Be Narrowly Construed

Petitions by utilities requesting that access to poles, ducts, conduits, or rights-of-way be limited to particular carriers or system facilities should be rejected. Section 224 requires that access be afforded to all telecommunications carriers. Among telecommunications carriers, different classes of carriers require access to

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21. US ONE at 9.

22. GTE at 25; Pacific Telesis Group at 21.

various facilities to provide service according to the technology utilized. Congress accordingly amended Section 224 of the 1996 Act to require nondiscriminatory access. Therefore, in response to numerous petitions requesting that access be limited, the Commission should clarify accordingly that access is not limited according to the type of carrier providing service, nor to conventional poles in a utility system.

Section 224 must be broadly construed in order to provide competitive opportunities to all telecommunications carriers as intended by Congress. "Pole attachment" is defined as "any attachment by a cable television system or provider of telecommunications services to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[23] Winstar persuasively argues that unless the terms "poles, ducts, conduits, and rights-of-way" are read broadly, the statutory mandate of Section 224 will not be met.[24] Section 224(f)(1) requires that nondiscriminatory access be available to all telecommunications carriers. This obligation applies on a system-wide basis and should not be limited to the question of access one pole at a time.[25]

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23. 47 U.S.C. § 224(a)(4); see also Airtouch at 24; AT&T at 36.

24. See Winstar at 5-13.

25. Some utilities have argued that use of the words "in whole or in part" to describe a utility's use of poles, ducts, conduits, and rights-of-way indicate that access to these facilities should be limited. See, e.g., Florida Power and Light Co. at 39 (stating that "Congress intended the Commission's jurisdiction to be invoked on a pole-by-pole basis, not a system-wide basis"). This argument is unavailing, however, because the cited statutory language is intended to describe the parties that bear the obligation, not the extent of the obligations. See ALTS at 25.

TCG agrees that unless nondiscriminatory access is granted to utility facilities — including roofs and riser conduits — cellular carriers will be denied the same opportunity to provide service.[26] In addition, as ILECs begin to utilize different technologies to offer service, for example, wireless local loops, all telecommunications carriers should have access to these facilities as either an actual or potential part of the distribution facility.[27] Winstar observes that "even the most established incumbent LECs are rethinking and revising their methods of provisioning local exchange service,"[28] and telecommunications carriers must have the opportunity to provide new, more efficient services as well. These inevitable evolutions in the method of providing service demonstrate that a static concept of the "distribution network" or "bottleneck facilities"[29] will limit the ability of telecommunications carriers to provide competitive service, thereby failing to satisfy the requirement of nondiscriminatory access in violation of the 1996 Act.[30]

Some parties incorrectly have urged the Commission to limit the effect of Section 224. For example, American Electric Power Service ("AEPS") claims that

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26. Winstar at 2-4; see also AT&T at 32; CTIA at 10-15.

27. Winstar at 7.

28. Id.

29. See Sprint at 22-23 (claiming that carriers are not permitted access to rooftops because they are not a "bottleneck facility" and do not relate to the "distribution network"); see also USTA at 43; Edison Electric at 4-5.

30. Winstar at 7-8.

a narrow interpretation should be applied to the definition of "pole attachment." Specifically, AEPS claims that the legislative history supports this argument because Congress specified that "[d]uct or conduit systems consist of underground reinforced passages for electric and communications facilities as well as underground dips, lateral members, hand holes, splicing boxes, or pull boxes."[31] Reliance on only this language, however, reads out of the statute the term "rights-of-way," which, like the other terms listed in Section 224(f)(1) must be given full effect.[32]

The Commission should reject efforts to narrow the obligation of utilities to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way. Unless access is granted both to traditionally utilized facilities and those facilities that are being increasingly employed to provide telecommunications services through alternative means, telecommunications carriers will be denied nondiscriminatory treatment and the underlying purpose of Section 224 would be thwarted.

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31. AEPS Opposition to Winstar at 7 (quoting S. Rep. No. 580, 95th Cong. 1st Sess. 26); see also GTE at 39-40.

32. Ameritech attempts to address the meaning of "rights-of-way," stating that "[i]n law, the term refers to the right to use or pass over property of another, or that strip of land or other property used or passed over." Ameritech at 42. However, TCG disagrees that this definition requires that access to rights-of-way be limited to "those easements and licenses to use the property of others for network and cabling equipment," as claimed by Ameritech (at 43).

B. The Commission Should Reject Petitions Proposing to Permit Utilities to Deny Access to Reserved Pole Space

Utilities should be required to provide telecommunications carriers access to unused, yet "reserved," facility space. AT&T affirms that the Commission has correctly concluded that permitting a utility to deny access based on claims of "reserved" capacity "would nullify, to a great extent, the nondiscrimination that Congress required."[33] Similarly, NCTA supports the Commission's findings in the First Report and Order as a "fair balance between the needs of utilities to expand to serve additional customers and the rights of cable operators and telecommunications carriers to obtain space in the face of warehousing by pole owners."[34] TCG agrees that the Commission's rules effectively implement Congress' intent to prevent utilities from blocking cable operators and telecommunications providers from utilizing available capacity on these facilities. Therefore, Petitions for Reconsideration of this issue should be rejected.

IV. PARTIES AGREE THAT THE CROSS-CONNECT FACILITY SHOULD BE CLASSIFIED AS AN UNBUNDLED NETWORK ELEMENT

Parties that have addressed the issue of the treatment of the cross-connect facility widely agree that it is an essential element of the local loop and should be included as an unbundled network element according to MFS' petition. Sprint states that "[m]ultiplexing and cross-connects are a fixture in the ILECs' current

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33. AT&T at 32 (citing First Report and Order at ¶ 1170).

34. NCTA at 28.

access and interconnection offerings, and there is no reason why the Commission should not order these basic building blocks to be provided as unbundled network elements for purposes of local interconnection."[35] US ONE suggests that the Commission specify that cross-connects are included within the loop element because "loops without cross-connects are useless."[36] In fact, AT&T argues that the First Report and Order may already include cross-connects as an "indispensable part of the network elements that the Commission has already identified," but that the Commission should either clarify the Order or grant the MFS petition.[37]

TCG agrees that the Commission should clarify that cross-connects are an essential part of the local loop by identifying the cross-connect as a separate element. In addition, TCG reiterates that this outcome should not preclude CLECs from self-provisioning the cross-connect facility.

V. CONCLUSION

For the reasons stated above, TCG urges the Commission to grant TCG's Petition for Reconsideration and (1) adopt performance standards and reporting requirements for monitoring of ILEC compliance; and (2) implement a distinct pricing standard for transport and termination. In addition, the Commission should clarify that nondiscriminatory access to "poles, ducts, conduits, and rights-of-way"

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35. Sprint at 3; see also ALTS at 15 (urging the FCC to include the cross-connect facilities on the list of unbundled network elements).

36. US ONE at 7.

37. AT&T at 9-10.

should not be narrowly interpreted, applies to all telecommunication carriers without regard to the technology they employ, and mandate that unused space on poles be made available to requesting carriers. Finally, the Commission should grant requests to classify the cross-connect facility as an unbundled network element.

Respectfully submitted,

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November 12, 1996

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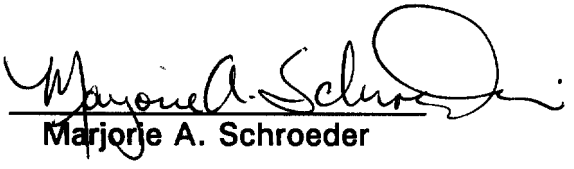

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